

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 21, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2065

Cir. Ct. No. 2015CV138

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE ALBERT L. SUSTRICK AND
ROSEMARY I. SUSTRICK FAMILY TRUST:**

STEPHEN SUSTRICK,

APPELLANT,

V.

STEPHENSON NATIONAL BANK & TRUST,

RESPONDENT.

APPEAL from an order of the circuit court for Marinette County:
DAVID G. MIRON, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Stephen Sustrick, pro se, appeals an order disposing of a petition for court intervention filed by the corporate trustee of a

family trust. This order was entered following an evidentiary hearing that Stephen did not attend.¹ Shortly before the hearing, Stephen filed two motions, both of which the court denied as being untimely. Sustrick also had previously requested to appear at the hearing by telephone. The court denied the request to appear by telephone as being unworkable, given the large number of parties interested in the trust and the petition. Stephen contends the circuit court violated his due process rights by ruling on the petition without his participation at the evidentiary hearing and by refusing to hear his motions. Stephen also argues the circuit court improperly ignored his factual allegations such that the court's factual findings are clearly erroneous. We affirm.

BACKGROUND

¶2 On May 27, 2015, the Stephenson National Bank & Trust (“SNB”) filed a petition pursuant to WIS. STAT. § 701.0201 (2015-16),² which, among other things, sought circuit court acknowledgment of SNB's resignation as the corporate trustee of the Albert L. Sustrick and Rosemary I. Sustrick Family Trust (“the Trust”). The Trust had seventeen beneficiaries, all of whom were nephews or nieces of the grantors and one of whom was Stephen. Stephen filed a written response to the petition on August 17, 2015, objecting to its claims on multiple grounds, mostly with respect to SNB's alleged handling of the Trust. Stephen was

¹ Given the trust at issue is a family trust with a large number of beneficiaries, we refer to Stephen Sustrick by his first name in this opinion.

² All future references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the only beneficiary to express to the circuit court dissatisfaction with SNB's handling of the Trust.³

¶3 All parties in interest, including Stephen, were notified on or about June 4, 2015, that SNB's petition would be heard before the circuit court on August 24, 2015, at 2:30 p.m. On August 14, 2015, Stephen called the circuit court to request that he be allowed to appear at the August 24, 2015 hearing by telephone, as he was a pro se litigant residing in California. The record contains a handwritten note from the circuit court judge denying this request, explaining, "I have gotten lots of letters on this and if all want to appear by phone it will be impossible." Below the judge's note is an additional notation that at 1:22 p.m. that same day, Stephen was advised of the court's decision.

¶4 On August 21, 2015, which was the Friday before the Monday evidentiary hearing, the circuit court received a "Motion to Compel" from Stephen requesting that the court make "opposing counsel ... clarify involvement and extent of involvement regarding item 2. CONFLICT OF INTEREST of [Stephen's] Response to Petition," which related to communications SNB had with some of the beneficiaries. The motion included a cover letter from Stephen stating, in part, "In association with this motion, I request to appear telephonically as it is not practical for me to appear in person to make this motion." On the record copy of this letter, there appears a handwritten notation, which reads: "8-21-15 10:20 am. Left VM message for Stephen Sustrick advising this motion will not be heard on 8-24-15 and Judge denied request for phone appearance. SV."

³ Twelve of the seventeen beneficiaries, including Stephen, sent the court writings regarding SNB's petition.

¶5 On the day of the hearing, the circuit court received an additional motion from Stephen, denominated a “Motion to Compel,” in which Stephen sought to have the court require SNB “to fulfill its Fiduciary requirements and issue disbursements as required under the Trust agreement.” Meanwhile, on Sunday, August 23, 2015, Stephen had sent a facsimile to the clerk of the circuit court requesting for a third time to appear by phone “because it is impractical to appear in person to make oral arguments and motions.” The facsimile also stated: “I had a phone call from ‘Stephanie’ stating that I am being denied appearance via telephone. Please provide me with written evidence of this determination.”

¶6 The only individuals to appear at the August 24, 2015 hearing were two SNB employees and SNB’s counsel. At the beginning of the hearing, the circuit court acknowledged Stephen’s requests for telephonic participation and the court’s prior denial of that request. The court stated:

And my reason for doing so is because there are seventeen beneficiaries of this Trust. And my fear, of course, is that if I let one individual appear by telephone, then they’re all going to want to appear by telephone and I simply cannot handle that. We don’t have the capability of doing that.

The circuit court also noted at the hearing’s conclusion that Stephen knew about the hearing, he could have attended it in person, but he chose not to do so.

¶7 During the hearing, a representative of SNB testified that its desire to resign as trustee was due in large part to Stephen’s disruptive behavior, including harassing phone calls and communications to bank officials regarding SNB’s administration of the trust. This behavior commenced when SNB denied Stephen’s request to amend the trust to change the identity of one of the beneficiaries. Other testimony from an SNB employee outlined the positive financial performance of the Trust, as well as the expense allocation SNB

proposed to implement as part of its resignation process and the termination of the Trust.

¶8 At the end of the hearing, the circuit court concluded: (1) the accountings from SNB were acceptable; (2) legal fees and other costs in the amounts of \$2,281.25, \$641.00, and \$75 respectively were properly assessed against Mark Sustrick's share; (3) legal fees relating to the trustee's resignation in the amount of \$6,147.19 were properly paid from Stephen's share; and (4) SNB was permitted to resign as trustee. The circuit court further concluded Stephen had not set forth any viable claim against SNB. No further reference occurred regarding Stephen's two motions. On September 1, 2015, a written order was entered, further providing that SNB's resignation was acknowledged and that SNB would continue as trustee for purposes of terminating the Trust. Stephen appeals.

DISCUSSION

¶9 Stephen essentially raises three arguments on appeal. The first two are presented either as alleged violations of his due process rights or the circuit court's erroneous exercise of its discretion. Stephen first asserts "the Circuit Court abused its discretion in denying him telephonic appearance effectively excluding [him] from the Hearing[,] constituting a denial of due process rights under the Fifth and Fourteenth Amendments of the United States Constitution." This is particularly egregious, he argues, given his status as a pro se litigant. Stephen also claims the circuit court erred by refusing to consider his two motions to compel that he filed immediately before the hearing. Finally, Stephen contends the circuit court's rulings and order contain clearly erroneous factual findings, in large part due to the court's refusal to consider the "evidence" Stephen presented in his filings to the court but failed to present at the hearing, given his absence.

Due Process and Exercise of Discretion

¶10 A civil litigant has a procedural due process right of “adequate, effective, and meaningful” access to the courts and is entitled to a fair opportunity to present his or her claim. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 474, 565 N.W.2d 521 (1997) (citations omitted). Whether a litigant’s due process rights have been violated is a question of law we review de novo. *State v. Aufderhaar*, 2005 WI 108, ¶10, 283 Wis. 2d 336, 700 N.W.2d 4.

¶11 We conclude there was no due process violation arising from the circuit court’s refusal to allow Stephen to attend the August 24, 2015 hearing by telephone. Stephen was provided ample and timely notice of the August 24, 2015 hearing, and he was permitted to attend that hearing in person and be heard. These undisputed facts alone defeat his due process claim. A litigant’s due process rights encompass only notice and the opportunity to be heard at a meaningful place and time. *American Eagle Ins. Co. v. Wisconsin Ins. Sec. Fund*, 2005 WI App 177, ¶44, 286 Wis. 2d 689, 704 N.W.2d 44; *Riemer v. Riemer*, 85 Wis. 2d 375, 377, 270 N.W.2d 93 (Ct. App. 1978). Stephen was provided such notice and opportunity, and he makes no argument that it was impossible for him to attend in person.⁴ A party who fails to appear at a properly noticed hearing “cannot be

⁴ Stephen provided no reasons for his inability to attend, other than his pro se status and the distance that he would need to travel. His pro se status alone does not entitle him to appear telephonically at an evidentiary hearing, especially one in which he was going to provide the most, if not only, evidence in opposition to SNB’s petition. He provides no relevant legal authority on point, citing only to a few cases involving incarcerated pro se litigants. Stephen also knew more than two months in advance of the scheduling of the hearing; he knew ten days in advance of the certainty the court was not permitting him to attend by phone. In all, Stephen failed to provide any persuasive good cause for the court to allow his appearance at this evidentiary hearing via telephone.

heard to complain about the [tribunal’s] order that results from that hearing.” *American Eagle Ins. Co.*, 286 Wis. 2d 689, ¶46; *see also Herlache v. Blackhawk Collision Repair, Inc.*, 215 Wis. 2d 99, 102, 572 N.W.2d 121 (Ct. App. 1997); *Riemer*, 85 Wis. 2d at 377 (“[A] defendant is not denied due process when the defendant has had timely notice and yet fails to make a timely appearance and presentation of evidence.”).

¶12 To the extent Stephen is arguing the circuit court erroneously exercised its discretion in refusing to allow Stephen to participate at the evidentiary hearing by telephone, we again disagree. The decision whether to allow telephonic testimony lies within the sound discretion of the circuit court. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶32, 312 Wis. 2d 435, 752 NW2d 359. A circuit court’s determination concerning the issue of telephonic appearances and testimony is guided by WIS. STAT. § 807.13.⁵ A circuit court’s discretionary acts are sustained if the court reviewed relevant facts, applied a proper standard of law,

⁵ WISCONSIN STAT. § 807.13 provides, in pertinent part:

- (1) ORAL ARGUMENTS. The court may permit any oral argument by telephone.
- (2) EVIDENTIARY HEARINGS. In civil actions and proceedings, including those under chs. 48, 51, 54, and 55, the court may admit oral testimony communicated to the court on the record by telephone or live audiovisual means, subject to cross-examination, when:
 - (a) The applicable statutes or rules permit;
 - (b) The parties so stipulate; or
 - (c) The proponent shows good cause to the court.

The statute then lists eight “appropriate considerations” for the circuit court in making its determination.

demonstrated a rational process and reached a conclusion that a reasonable judge might reach. *Farmers Auto. Ins. Ass’n v. Union Pac. Ry. Co.*, 2009 WI 73, ¶32, 319 Wis. 2d 52, 768 N.W.2d 596; *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶13 The circuit court rejected Stephen’s request for a telephonic appearance prior to the evidentiary hearing, reasoning that telephonic appearances and testimony would be improper because of the large number of interested parties. There were seventeen Trust beneficiaries at the time of the hearing and, as Stephen concedes, they are widely dispersed across the country. Stephen argues he was the only person to request telephonic appearance, and therefore it would have been workable for him alone to attend by telephone. But Stephen is only assuming that, if the circuit court had permitted one interested party to participate by phone, other parties, upon the notice that must be provided to all of them, would not then also request to appear by telephone. Indeed, many of the beneficiaries had already sent written communications to the circuit court. In short, it is speculation whether, given the opportunity of telephonic appearance, Stephen would have been the only person to request to appear by those means.

¶14 In any event, the circuit court can exercise its discretion to deny even one litigant’s telephonic appearance. The hearing was to be evidentiary in nature, requiring the review of documents, including accounting records, which would become unwieldy if even one person was appearing by phone. Furthermore, the circuit court’s findings at the hearing could easily turn on issues of credibility (especially based on the issues Stephen was attempting to raise), which determinations could be hindered by the court’s inability to observe a witness’s demeanor while testifying. The circuit court’s reasoned determination was a proper exercise of its discretion.

¶15 Stephen also takes umbrage with the circuit court allegedly not providing him with a reason for its not allowing him to appear telephonically until the day of the hearing. This contention is factually inaccurate and, in any event, immaterial. The record reflects that on August 14, 2015—ten days before the scheduled hearing—circuit court staff told Stephen by phone both that he would not be allowed to attend the hearing by telephone and of the court’s reason, which was that it would be impossible to have everyone who had sent the court correspondence regarding the petition to attend by phone. Furthermore, the court’s staff reiterated the court’s decision in a voice message on the Friday before the hearing.

¶16 In any event, it is immaterial whether the circuit court provided a reason for its decision to Stephen before the hearing. What matters is that Stephen knew that if he wanted to participate in the evidentiary hearing, he must attend in person. He was first informed of the hearing in early June, but then waited until mid-August to inquire about attending by telephone. Then, when expressly informed ten days before the hearing he needed to attend in person, he still made no plans to do so. Participation in litigation carries with it certain obligations. Here, Stephen had one of two options to participate in a hearing at which matters he vigorously wished to contest were to be determined: attend in person as a pro se litigant, or retain an attorney to appear on his behalf. He chose to do neither.

¶17 The circuit court also did not err in refusing to consider Stephen’s two motions that were filed right before the hearing—indeed, one was not received until the day of the hearing. Stephen’s only argument on this issue is to summarily claim his motions complied with WIS. STAT. § 801.16 and Marinette County Circuit Court Rule 7. Section 801.16 provides the form in which

pleadings and other papers are to be submitted, and Marinette County Circuit Court Rule 7 describes the rules for filing by facsimile. Neither rule addresses the timeliness of such pleadings, which was the issue seemingly fatal to Stephen's two motions to compel. He provides no explanation connecting the timeliness of his filings with compliance with those court rules, nor does he offer any further argument for why the circuit court erred in failing to address his motions under the circumstances.

¶18 Moreover, Stephen did not comply with the applicable rules regarding the timeliness of his motions. WISCONSIN STAT. § 801.15(4) is the generally applicable rule in terms of the timeliness of Stephen's motions, and it provides in part:

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by statute or by order of the court. Such an order may for cause shown be made on ex parte motion.

Both of Stephen's motions to compel were untimely under this rule, as well as under the only possibly applicable Marinette County Circuit Court Rule, which requires filing and service of motions at least ten days prior to any scheduled hearing date.⁶ Stephen has pointed to no other provision in a scheduling order or

⁶ The applicable local rule, if any, appears to be Marinette County Circuit Court Rule 903. It provides, in relevant part:

If the movant desires to file a brief in support of a motion other than one for summary judgment or dismissal, the brief shall be served and filed with the Clerk of Courts; a copy shall be served and filed on all opposing counsel; and a copy shall be filed with the assigned judge with the notice of motion or at least ... 10 days prior to any scheduled hearing date. ... Briefs filed in an untimely fashion may be disregarded by the court.

rule that would have required the circuit court to consider his two motions, one filed on the last business day before the hearing and the other filed on the day of the hearing, such that the court would have erroneously exercised its discretion in not addressing them.

¶19 Finally, as with Stephen's argument regarding his request to appear by telephone, he provided neither in the circuit court nor before this court any argument of good cause for his tardy filings. In all, the circuit court neither erroneously exercised its discretion nor denied Stephen due process in refusing to consider his untimely motions.

The Circuit Court's Factual Findings Are Not Clearly Erroneous

¶20 Stephen alternatively argues the circuit court's findings of fact are clearly erroneous. A circuit court's factual findings are upheld unless they are clearly erroneous. ***Halverson v. River Falls Youth Hockey Ass'n***, 226 Wis. 2d 105, 115, 593 N.W.2d 895 (Ct. App. 1999). Assertions of fact by a party that are unsupported by the record are not to be considered on appeal. ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W. 2d 214 (Ct. App. 1991).

¶21 Despite ostensibly fashioning his argument as one of there being clearly erroneous factual findings, Stephen nowhere argues that either the testimony the SNB employees provided at the hearing, if deemed credible by the circuit court, or the exhibits received at that hearing could not support the circuit court's factual findings. This includes his failing to argue or otherwise explain how the court's findings from that evidence should be deemed clearly erroneous. Rather, Stephen merely proclaims on appeal that the testimony SNB provided at the hearing was untruthful. The time and place, however, for Stephen to have confronted the veracity of SNB's testimony and exhibits—or to have otherwise

presented his case and evidence—was the hearing. Again, he chose not to attend the hearing. Stephen cannot now attempt, on appeal, to present his evidence or to assail the credibility of witnesses whom he chose never to cross-examine. *See State v. Below*, 2011 WI App 64, ¶3, 333 Wis. 2d 690, 799 N.W.2d 95 (observing the court of appeals’ role is not to sit as fact-finder).

¶22 Stephen insists the circuit court’s findings are clearly erroneous because the court did not consider the “evidence” he submitted in his written submissions, or he would have attempted to offer if he had attended the hearing. This argument fails. As an initial matter, none of Stephen’s submissions—either his August 17, 2015 written response to the petition or his two untimely motions to compel—constituted evidence before the court. They are unsworn pleadings. More problematic, Stephen did not testify under oath and was not subject to cross-examination. Given Stephen’s failure to attend the August 24, 2015 hearing, he simply never presented any evidentiary facts for the circuit court’s proper consideration. With no conflicting evidence before the court, we have no basis for concluding its findings of fact were clearly erroneous.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

